

[Cite as *State v. Lynch*, 2009-Ohio-3730.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90630

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEROY LYNCH

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 418389
LOWER COURT NO. CR-443146
COMMON PLEAS COURT

RELEASE DATE: July 24, 2009

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SEAN C. GALLAGHER, J.:

{¶ 1} On February 9, 2009, the applicant, Leroy Lynch, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, applied to reopen this court's judgment in *State of Ohio v. Leroy Lynch*, Cuyahoga App. No. 90630, 2008-Ohio-5594, in which this court affirmed Lynch's sentences for murder, felonious assault, aggravated robbery, tampering with evidence, having a weapon under disability, and three-year firearm specification. Lynch argues that his appellate counsel was ineffective because he did not properly conceptualize the case and thus submitted an ill-founded assignment of error. On March 6, 2009, the State of Ohio filed its brief in opposition. For the following reasons, this court denies the application to reopen.

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 3} In *Strickland* the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 104 S.Ct. at 2065.

{¶ 4} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 . Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgments and impose on

appellate counsel the duty to raise every “colorable” issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶ 5} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel’s performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 6} Appellate counsel is not deficient for failing to anticipate developments in the law or failing to argue such an issue. *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298; *State v. Columbo* (Oct. 7, 1987), Cuyahoga App. No. 52715, reopening disallowed (Feb. 14, 1995), Motion No. 55657; *State v. Munici* (Nov. 30, 1987), Cuyahoga App. No 52579, reopening disallowed (Aug. 21, 1996), Motion No. 71268, at 11-12: “appellate counsel is not responsible for accurately predicting the development of the law in an area marked by conflicting holdings.” *State v. Harey* (Nov. 10, 1997), Cuyahoga App. No. 71774, reopening disallowed (July 7, 1998), Motion No. 90859; *State v. Sanders* (Oct. 20, 1997), Cuyahoga App. No. 71382, reopening disallowed, (Aug. 25, 1998), Motion No. 90861; *State v. Bates* (Nov. 20, 1997), Cuyahoga App. No. 71920, reopening disallowed (Aug. 19, 1998), Motion No. 91111; and *State v. Whittaker* (Dec. 22, 1997), Cuyahoga App. No. 71975, reopening disallowed, (July 28, 1998), Motion No. 92795.

{¶ 7} The instant case has a tortuous procedural posture.

{¶ 8} In September 2003, Lynch participated in a robbery to steal a car. During the attempt Lynch's accomplice shot and killed one man and shot and wounded another. In the Spring of 2004, a jury found Lynch guilty of two counts of murder, two counts of felonious assault, one count of aggravated robbery, one count of tampering with evidence and attendant firearm specifications. The judge found him guilty of having a weapon while under disability. The judge sentenced him to three years on the firearm specification consecutive to all other sentences; fifteen years to life on the murder charges, concurrent to each other but consecutive to the other sentences; eight years on the felonious assault charges, one concurrent with the other sentences and one consecutive; ten years consecutive for aggravated robbery; five years consecutive for tampering with evidence; and twelve months concurrent for the weapon under disability charge.

{¶ 9} In Lynch's first appeal, *State v. Leroy Lynch*, Cuyahoga App. No. 84637, 2005-Ohio-3392, this court affirmed his convictions, but vacated the sentence and remanded for resentencing. The trial court had not made the proper and necessary statutory findings to impose maximum and consecutive sentences and had not explained post-release control.

{¶ 10} On January 31, 2006, the trial court resentenced Lynch as follows: three years on the firearm specification; fifteen years to life on the murder charges which merged but consecutive to the other sentences as specified; five years on the felonious assault charges, concurrent to each other but consecutive to the murder charges; two years on the tampering

with evidence charge concurrent with the other sentences;¹ one year on the weapon under disability charge, concurrent to the other sentences; and seven years on the aggravated robbery charge, consecutive. During the resentencing hearing the trial judge explained post-release control, and went to great lengths to make the necessary statutory fact finding to impose consecutive and non-minimum sentences. The sentencing entry concluded with the notation, "Felony sentencing findings signed, attached and ordered filed, order see journal." The judge also promised to appoint appellate counsel for Lynch.² However, the trial court did not appoint appellate counsel until late May 2006, approximately three months after the time for commencing an appeal had lapsed.

{¶ 11} In the meantime on February 27, 2006, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 945 N.E.2d 470, the Supreme Court of Ohio ruled that those provisions of the Ohio Revised Code which required judicial fact finding in order to impose more than the minimum or consecutive sentences were unconstitutional pursuant to *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The Supreme Court of Ohio excised those provisions and gave the trial courts full discretion to impose a prison sentence within the statutory range; the trial courts no longer had to make findings or give their reasons for imposing maximum, consecutive or more than the minimum sentences.

¹ During the sentencing hearing the judge said that the sentence for tampering with evidence would be five years, concurrent with the aggravated robbery sentence.

² Lynch attached relevant portions of the resentencing transcript to his application. The court further notes that the second cover page indicates that the hearing was on January 31, 2007. This is inconsistent with the docket and subsequent pages of the transcript. The court further notes that this transcript bears a clerk's file-stamp of December 17, 2007, and a court of appeals file-stamp of December 18, 2007.

{¶ 12} On June 6, 2006, Lynch's appointed appellate counsel endeavored to commence an appeal by filing a motion for delayed appeal. However, this court denied the motion a month later. *State v. Lynch* (July 6, 2006), Cuyahoga App. No. 88261.

{¶ 13} On September 1, 2006, Lynch filed a petition to vacate or set aside sentence; he argued that pursuant to *State v. Gover* (1995), 71 Ohio St.3d 577, 645 N.E.2d 1246, the trial court's failure to timely appoint an appellate attorney was a denial of his right to appeal, and the trial court should vacate the sentence and reenter it, so that the appeal time may recommence. The trial court denied the petition. However, on appeal of that denial, this court reversed and remanded on the basis of *Gover*. This court further stated that the appropriate remedy "is for the trial court to reenter the judgment of conviction against Lynch that was imposed on January 31, 2006****" and thus reinstate the time for filing a timely notice of appeal. *State v. Lynch*, Cuyahoga App. No. 88899, 2007-Ohio-4678, ¶12.

{¶ 14} On October 25, 2007, the trial court complied with the remand. In an entry journalized October 30, 2007, the trial court stated: "Re-sentencing, court re-imposes original sentence. Defendant in court, counsel was present."³ The trial court then reiterated the convictions and imposed the identical sentence of January 31, 2006. However, this entry does not refer to felony sentencing findings, but concludes: "Defendant advised of appeal rights. Defendant indigent, court appoints Thomas A. Rein as appellate counsel. Transcript at state's expense. Defendant to pay court costs."

³ Both original appellate counsel and Murnahan counsel assert that there was no real hearing in October 2007, and that neither Lynch nor defense counsel were present. However, neither raised this as an assignment of error, and this court will, accordingly, not consider the issue.

{¶ 15} In the instant appeal original appellate counsel argued that the retroactive application of *Foster* to resentence Lynch in October 2007 violated the Ex Post Facto and Due Process Clauses of the United States Constitution. Appellate counsel continued that the trial court should have sentenced Lynch under the statutory scheme requiring statutory findings to impose consecutive and more than the minimum sentences. This court rejected that argument.

{¶ 16} Now Lynch, through his current attorney, maintains original appellate counsel mischaracterized the entire case. Because the October 2007 entry was merely the re-entry of the January 2006 entry to “reset the clock” to allow an appeal, the October 2007 entry was not an authentic *Foster* resentencing; rather, it was really a pre-*Foster* statutory sentencing. The sentences imposed were constitutionally invalid because they were functions of facts found by a judge, not a jury. Thus, appellate counsel should have argued that the trial court erred by imposing a sentence relying on facts that the jury did not find. *Apprendi* and *Blakely*.

{¶ 17} Deciding how to characterize a case is the very basis of strategy. This court concludes that the original appellate counsel was not deficient for deciding to characterize this case as a *Foster* resentencing. First, October 30, 2007, was well after *Foster*, and the presumption of regularity would indicate that the judge would apply the correct law as of that date. Second, the sentence imposed is within the statutory range of permissible sentences, and the trial judge stated in the journal entry that this was a resentencing. Furthermore, unlike the January 2006 entry, the trial judge made no references to felony sentencing findings. Given the complicated, tortuous procedural posture of this case and the

developing and conflicting decision regarding sentencing in Ohio, original appellate counsel made a reasonable strategic decision in concluding that the October 2007 resentencing was pursuant to *Foster*. This court will follow the admonition of the United States Supreme Court and not second-guess the reasonable professional strategic decisions of counsel.

{¶ 18} Moreover, Lynch has not shown prejudice. In the opinion this court accepted the conclusion that the October 2007 entry was pursuant to *Foster*: “*Foster* was decided on February 27, 2006 and the trial court resentenced defendant on October 20, 2007.” The court then examined the resentencing under *Foster*. 2008-Ohio-5594, ¶8. Thus, this court is not convinced that it would have accepted Lynch’s current premise.

{¶ 19} Accordingly, this court denies the application to reopen.

SEAN C. GALLAGHER, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
ANN DYKE, J., CONCUR